

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLES R. KING)	
Claimant)	
VS.)	
)	Docket No. 189,943
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Both claimant and respondent requested review of the Award dated January 10, 1997, entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument on July 15, 1997.

APPEARANCES

James P. Johnston of Wichita, Kansas, appeared for claimant. Vaughn Burkholder of Wichita, Kansas, appeared for respondent and its insurance carrier. Randall C. Henry of Hutchinson, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a 65 percent work disability. Both claimant and respondent filed applications to request the Appeals Board to review the issue of nature and extent of disability. That is the only issue before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be affirmed.

Claimant is 41 years old and began working for respondent in February 1989. Claimant alleges he sustained repetitive overuse trauma to both upper extremities between June 15, 1992, and his last day of work on April 7, 1993. Claimant also alleges he sustained distinct accidents occurring on June 15, 1992, and February 18, 1993, involving the left upper extremity and another distinct accident occurring on February 5, 1993, involving the right upper extremity. The respondent and its insurance carrier admitted claimant sustained injuries as alleged.

As a result of claimant's work-related accidents, claimant underwent left elbow surgery in June 1993, right elbow surgery in July 1994, and right wrist surgery in August 1994. In December 1994 claimant's treating physician, board-certified orthopedic surgeon Harry A. Morris, M.D., diagnosed reflex sympathetic dystrophy in the right upper extremity. In late summer or fall 1994, claimant began to experience pain and numbness in his legs for which he sought medical treatment from board-certified internist Robert J. Fowler, M.D.

Claimant testified at his first regular hearing, which was held in January 1996, that he continued to experience pain in his left hand, pain which radiated from his left forearm to his armpit, and numbness in his left thumb, index finger, and middle finger. At that time he also indicated he experienced pain in both shoulders which radiated into the neck and that he had pain between his shoulder blades. Claimant further testified he was unable to lift anything heavier than a coffee cup with his right arm and that he experienced problems pulling up his pants. Claimant is right-hand dominant and believes his left arm is somewhat better than his right.

At the second regular hearing held in October 1996, claimant testified his pain had increased in both arms and shoulders. He was still experiencing problems in his back, legs, and groin, which he believed was related to the spread of the reflex sympathetic dystrophy. At that time claimant was using two TENS units which were placed on both shoulders and both forearms.

Claimant testified that because of his ongoing symptoms he has not sought employment since being released to return to work by Dr. Morris in March 1995. Also, he

testified his symptoms prevented him from attending classes to complete a paralegal degree which he began in the spring of 1994 and later discontinued after one semester because of severe pain in the right hand and shoulder caused from writing.

Claimant presented the testimony of board-certified orthopedic surgeon Harry A. Morris, M.D., who limits himself to the treatment of upper extremities. Between November 1992 and March 1995, he treated claimant for bilateral epicondylitis and bilateral carpal tunnel syndrome. He is the doctor who performed the three surgeries involving both of claimant's elbows and right hand. In June 1993, Dr. Morris operated on claimant's left arm and performed a left elbow release. In July 1994, the doctor operated on claimant's right arm and performed a right lateral elbow release and right radial nerve decompression. In August 1994, he again operated on claimant and released both the right carpal tunnel and the right radial nerve at the wrist.

Dr. Morris testified claimant developed reflex sympathetic dystrophy in the right upper extremity as a result of the surgeries he performed coupled with claimant's psychiatric status. Although claimant did not have all of the classic symptoms of reflex sympathetic dystrophy, Dr. Morris believed it was a proper diagnosis based upon the clinical findings such as hand discoloration, an abnormal sweating pattern, and the positive results of a bone scan.

Using the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment, Dr. Morris believes claimant has a 39 percent permanent partial functional impairment in the right upper extremity, 15 percent of which is due to reflex sympathetic dystrophy, and a 15 percent permanent partial functional impairment to the left upper extremity, all of which combine for a 35 percent functional impairment to the whole body. The doctor was not asked whether claimant's alleged back, groin, and leg symptoms were related to claimant's work-related injuries. The doctor last saw claimant in March 1995.

In his letter dated June 27, 1995, Dr. Morris wrote that claimant should be restricted from repetitive activities and limited to light work where he would not lift more than 20 pounds at any time or frequently lift weights of more than 10 pounds.

Claimant also presented the testimony of board-certified orthopedic surgeon James L. Gluck, M.D. In September 1996 he performed an independent medical evaluation of claimant at the request of Special Administrative Law Judge Michael T. Harris. Dr. Gluck diagnosed post-traumatic bilateral lateral epicondylitis, right carpal tunnel syndrome, bilateral shoulder impingement, bilateral shoulder myofascial pain, and bilateral upper extremity sympathetically mediated pain syndrome. Although he believes claimant does not have classic reflex sympathetic dystrophy, he believes claimant has a component of the disease in both upper extremities.

Dr. Gluck believes claimant has a 28 percent functional impairment to the right upper extremity and a 19 percent functional impairment to the left upper extremity which combine for a 26 percent permanent partial impairment of function to the whole body according to the AMA Guides.

In his report dated September 5, 1996, Dr. Gluck indicated claimant should observe the following work restrictions: no lifting more than 5 pounds on an occasional basis; no repetitive hand activities; no vibratory tools; and no overhead reaching, pushing, or pulling. He also testified claimant is restricted to work which is either sedentary or light and which requires no repetitive hand or arm activity. He also testified he believes Dr. Morris' impairment ratings combine to create a 30 percent rather than 35 percent whole body functional impairment rating according to the AMA Guides. Dr. Gluck was not asked whether claimant's back, groin, and leg symptoms were related to his work-related injuries.

The third physician to testify for claimant, Robert J. Fowler, M.D., treated claimant between September 1994 and December 1995. Dr. Fowler is board certified in internal medicine and is claimant's private physician. He indicated claimant should observe the following restrictions as a result of the injuries to the upper extremities: no lifting or carrying; no pushing, pulling, or reaching with the right arm; avoid repetitive pushing and pulling with the left arm; no reaching with the left arm; no climbing ladders; no crawling; no handling large items; no finger manipulations; avoid extreme cold; avoid repetitive driving; and no vibratory tools. Dr. Fowler admits he does not understand reflex sympathetic dystrophy very well. He also was not asked if claimant's back, groin, and leg complaints were related to the work-related injuries.

Respondent and its insurance carrier presented the testimony of board-certified orthopedic surgeon Robert A. Rawcliffe, Jr., M.D. He saw claimant at respondent's attorney's request in September 1995. He diagnosed bilateral lateral epicondylitis and carpal tunnel syndrome. He did not find reflex sympathetic dystrophy. He believes claimant has a 28 percent functional impairment to the right upper extremity and a 5 percent functional impairment to the left which combine for a 19 percent whole body functional impairment under the AMA Guides. This doctor felt claimant should observe the following work restrictions: avoid all repetitive activities involving the hands, wrists, or elbows; and avoid extremely cold temperatures. Dr. Rawcliffe does not believe claimant could return to work in a factory setting due to those severe medical restrictions.

Although it is evident claimant has sustained permanent injury and impairment which severely restrict his opportunities to return to the open labor market, the Appeals Board is persuaded by Dr. Gluck's opinion that claimant is not permanently and totally disabled from engaging in substantial and gainful employment. The Appeals Board also finds claimant has sustained injury to both upper extremities as a result of his work-related accident, but he did not prove the back, groin, and leg symptoms are related to his work activities.

Because he sustained repetitive microtrauma to both upper extremities through his last day of work on April 7, 1993, claimant's permanent partial disability benefits are governed by K.S.A. 1992 Supp. 44-510e, which provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training,

experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

Respondent has neither attempted to return claimant to work nor provided vocational rehabilitation benefits to assist his return to gainful employment.

The Appeals Board is persuaded by the opinions of claimant’s vocational rehabilitation expert, James Molski, and finds that claimant has lost between 55 percent and 70 percent of his ability to perform work in the open labor market because of the work-related injuries to his upper extremities. Again being persuaded by Mr. Molski’s testimony, the Appeals Board also finds claimant retains the post-injury ability to earn approximately \$240 per week which creates an approximate 70 percent loss of ability to earn a comparable wage. Considering both losses, the Appeals Board finds claimant has a 65 percent permanent partial general disability for which claimant is entitled to receive permanent partial disability benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish, dated January 10, 1997, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James P. Johnston, Wichita, KS
Vaughn Burkholder, Wichita, KS
Randall C. Henry, Hutchinson, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director